

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 13, 2009

STATE OF TENNESSEE v. LESLIE RAYDELL JONES, JR.

**Direct Appeal from the Circuit Court for Bedford County
No. 15796 Robert G. Crigler, Judge**

No. M2008-01887-CCA-R3-CD - Filed July 20, 2009

The defendant, Leslie Raydell Jones, Jr., was convicted by a Bedford County Circuit Court jury of first degree premeditated murder and especially aggravated burglary. On direct appeal, this court affirmed the first degree murder conviction but modified the especially aggravated burglary conviction to a conviction for aggravated burglary. This court remanded for resentencing on the modified conviction, and the trial court imposed a Range I sentence of six years. The defendant appealed, arguing that the trial court erred in applying the “exceptional cruelty” enhancement factor. Following our review, we affirm the sentencing decision of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Michael A. Colavecchio, Nashville, Tennessee, for the appellant, Leslie Raydell Jones, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; Charles Frank Crawford, Jr., District Attorney General; and Michael D. Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The facts of the offense as recited by this court on direct appeal are as follows:

Officer Cody King of the Shelbyville Police Department testified that he was dispatched to the Bedford Manor Apartments in the early morning hours of December 16, 2004 to investigate a reported shooting. Upon arrival, a man and woman informed him that someone inside the apartments had been shot. When entering the victim’s apartment door, Officer King noticed that the door had a

footprint on it and was unlocked. Officer King secured the scene by checking to make sure no one else was in the apartment before attending to the victim. He described the victim, Terry Lynn Alford, as slumped over on the couch with a small knife in his hand. Officer King described the knife as a collector type and noted that an open display case was found on a table near the entry to the apartment.

John Riddle, a paramedic with the Bedford County Emergency Medical Services, testified that he was called to the victim's apartment on December 16, 2004 in response to a reported gunshot wound. He stated that the victim was not breathing and did not have a pulse upon his arrival at the scene. All efforts to resuscitate the victim were unsuccessful.

Jennifer Leann Nowlin, the defendant's girlfriend at the time of the incident, testified that she knew the victim as a friend of her mother. She recalled that her sister, Samantha, also lived in the Bedford Manor Apartments in December 2004. She stated that she and the defendant had spent December 15 "getting high" at her mother's home. She said that the victim called the defendant at her mother's home and, after the two talked, the defendant told her that they needed to go see the victim. She recalled that Jennifer Ellington drove them to the victim's apartment. She testified that the defendant told her to deliver "some stuff" to the victim while the defendant stayed in Samantha's apartment. She acknowledged that she delivered "crack or . . . something else of the sort" to the victim. The defendant instructed Nowlin to retrieve twenty dollars from the victim in exchange for the "stuff." She stated that the victim gave her a one hundred dollar bill and that she told him she would bring his change back to him later.

Instead of immediately returning with change, Nowlin went back to her mother's house with the defendant and Ellington. Soon thereafter, the victim telephoned and threatened Nowlin's life if she did not bring him his money. The victim persisted in his phone calls even after Nowlin hung up on him until eventually, the defendant spoke with the victim. Afterwards, the defendant indicated that he would go talk to the victim about the situation but that he needed to talk to his cousin, Darian Mays, first. Nowlin testified that the defendant left her mother's home with Lynette Noteboom. The two returned with Darian Mays, and then all three left again. She said that the defendant, Mays and Noteboom had been gone a while when she received a phone call from her sister, Samantha, reporting that something had happened at the apartment complex. When the defendant returned to her mother's house, he told Nowlin that he would be leaving for a few days. Nowlin spoke with the defendant later and he told her that "he did something really wrong." On cross-examination, Nowlin acknowledged that she never saw the defendant and the victim together on December 15 or 16 and that she never heard an altercation between them. She also stated that the victim's front door was unlocked when she delivered the drugs to him earlier that evening.

Lynnette Noteboom testified that Jennifer Ellington is a friend and that she came to Nowlin's mother's home in search of Ellington on December 15. She arrived at around 9:30 and visited with Nowlin, Ellington, the defendant, Nowlin's mother, and Nowlin's mother's boyfriend before leaving to pick up her son at the Bedford Manor Apartments to take him to work. After taking him to work, she returned to Nowlin's mother's house but found only Nowlin's mother and her boyfriend at the house. She recalled that the defendant, Ellington and Nowlin returned to the house. She also remembered that the defendant talked on the phone with someone and that he seemed "a little agitated." Noteboom reported that the defendant asked for a ride, so she took him to pick up Mays and returned to Nowlin's residence again. Once again, the defendant telephoned someone and appeared upset and agitated. The defendant asked Noteboom for a ride to the Bedford Manor Apartments, so she drove the defendant and Mays to the apartments.

At the apartments, the defendant instructed Noteboom to park in the back and to wait on him and Mays. Noteboom stated that she waited for about five minutes when both men returned to the car "moving pretty quick." Neither the defendant nor Mays mentioned what had happened in the apartment. Noteboom returned Mays to his apartment before she and the defendant returned to Nowlin's residence. She described the defendant as "cool as a cucumber" and reported that she never saw anyone with a gun. She recalled that Samantha Nowlin telephoned Jennifer Nowlin to tell her that something had happened at the Bedford Manor Apartments but that she "never thought it was from when [she] was out there with [the defendant and Mays]." Noteboom testified that she later identified the defendant and Mays as the two individuals she drove to the apartment complex that night.

Samantha Nowlin testified that she was living at the Bedford Manor Apartments on December 15, 2004. She stated that her apartment was across the hall and upstairs from the victim's apartment. Samantha Nowlin stated that her sister, Jennifer, was dating the defendant in December 2004. She recalled that the defendant came to her apartment to use the telephone on the evening of December 15. Later that evening, the victim stopped Nowlin outside the apartment and asked her for her mother's phone number. Sometime after midnight, as she was playing monopoly with her boyfriend and cousin, Nowlin testified that she heard some loud banging downstairs. Nowlin looked outside because she thought it could be the ex-husband of her friend and downstairs neighbor, Brandeise Collins, banging on a door. She could not tell which specific downstairs apartment the noise was coming from until she heard the victim say "I didn't do anything, man" in a scared voice. She recalled that Mays looked up at her from the stairway landing so she went back inside her apartment. Although she could not see another person downstairs with Mays, she could hear another individual. She recalled that her cousin, Laura Walden, took several steps further down the stairway that night than she had.

Samantha Nowlin testified that when she returned to her apartment, a downstairs neighbor, Brandeise Collins, telephoned her and asked her what was going on. She then heard the victim say "Oh, my God" followed by a gunshot. After she heard the gunshot, she called 911. After going downstairs, she could see through the slightly opened door of the victim's apartment that the victim was slumped over and had a gunshot wound to his left side. The police arrived soon thereafter, so she returned to her apartment to telephone her sister to report that the victim had been shot. Samantha Nowlin testified that she identified Mays from a photographic lineup as the person she saw near the victim's door that night immediately before she heard the gunshot. She reiterated that she also heard another individual speaking to the victim at that time.

Laura Walden testified that she was at Samantha Nowlin's apartment on the night of December 15, 2004. Her testimony was consistent with that of Samantha Nowlin. Additionally, she said that when she took several steps down the stairway, she saw the defendant at the victim's door. On cross-examination, she admitted that she did not identify the defendant in her initial statement to the police taken on December 16. On redirect, she explained that she did not identify the defendant or Mays because she was scared.

Brandeise Collins testified that she was living across the hall from the victim at the time of the incident. She testified that she was on the telephone with Samantha Nowlin trying to figure out what was going on when she heard the victim yell that he had not done anything followed by a gunshot. She soon heard someone exiting the building and tried to look out the window but could not see anyone outside.

Jennifer Brooke Ellington testified that in December 2004 she had known the defendant about six months. She recalled being with the defendant and Jennifer Nowlin at Nowlin's residence on December 15, 2004. She stated that the three of them spent most of the day together and left several times in her vehicle. Her testimony regarding the evening visit to Bedford Manor Apartments and telephone calls at Nowlin's residence was consistent with the testimony of the other witnesses. Ellington further testified that the defendant appeared angry after talking to the victim on the telephone. Her testimony regarding the defendant and Noteboom's activities with Mays was consistent with that of other witnesses as well. She testified that she left with the defendant to stay at a home of one of his relatives after the defendant returned from the apartments the last time that evening. When the police apprehended the defendant several weeks later, Ellington was with him and she told the police that he was not at the residence as she was instructed to do by the defendant. On cross-examination, Ellington admitted that she had been convicted of giving false information to the police for her attempt to protect the defendant from apprehension.

Darian Mays testified that the defendant is his cousin. He stated that the defendant telephoned him on the evening of December 15, 2004 and that later that night, the defendant and a girl named Lynn picked him up at a friend's apartment. They went to "some girl's house" in the country. He recalled that the defendant spoke to someone on the telephone and described that he talked in a normal voice, but that he was "cussing." After the telephone call ended, Mays stated that Lynn said "'come on, let's go,'" so Mays left with the defendant and Lynn. The three of them went to Bedford Manor Apartments where Lynn parked in the back. Mays testified that when the defendant kicked in a door to an apartment, Mays ran up the steps. Soon thereafter Mays heard a gunshot so he "took off running." Mays ran to Lynn's vehicle with the defendant arriving at the vehicle within seconds or a minute later. Mays and the defendant did not talk about anything that happened in the apartment building. Mays testified that he told the defendant to drop him off at home. Mays stated that he never saw the defendant with a gun that night and that he did not know the victim. He also acknowledged that he was charged with his involvement in the incident but that the warrants had not yet been served, that he was presently incarcerated on unrelated drug charges, and that he had not been promised anything in exchange for his testimony. He reiterated that the state had only asked him "[t]o tell the truth."

Linda Fleming Zimmerman testified that she was the victim's next door neighbor at the time of the offenses. She recalled that the victim arrived home around 5:00 p.m. on the evening of December 15, 2004. Nothing unusual occurred until later that night at about 1:30 a.m. on December 16. She heard a loud bang and walked to the peephole of her door to investigate the sound. She saw two men standing in the hallway and partially in the victim's doorway. One man was short and the other individual, who was in the victim's doorway, was taller. She heard the victim say that he had not done anything and saw the muzzle flash of a gun held by the taller man. The two men immediately left through the main door to the building. She went into the hallway and stood with Samantha Nowlin and another neighbor in the victim's doorway until the police arrived.

Detective Lori Mallard of the Shelbyville Police Department testified that she took statements from several witnesses on the night of the incident. Several weeks later, she prepared a photographic lineup that was shown to Samantha Nowlin who identified Mays as one of the perpetrators. Lynette Noteboom was shown a separate photographic lineup and identified the defendant and Mays as the two individuals she drove to the Bedford Manor apartments that night. Detective Mallard also participated in the defendant's apprehension where she observed the defendant trying to escape through a window from the residence. Detective Mallard collected several pairs of the defendant's shoes for processing by the Tennessee Bureau of Investigation Crime Laboratory. She also noted that the defendant was taller than Mays.

Detective Brian Crews of the Shelbyville Police Department testified that the investigation of the victim's homicide focused on the defendant and Mays after interviewing Samantha and Jennifer Nowlin and Lynnette Noteboom. Detective Crews recounted the defendant's apprehension and Jennifer Ellington's attempts to conceal the defendant's presence at the residence where he was found. He stated that the defendant surrendered in the face of the heavily armed police officers present at the scene. Detective Crews also took Mays' statement and denied that anyone from the state had promised Mays leniency in exchange for his testimony.

Assistant Medical Examiner Thomas Deering testified that he performed the autopsy of the victim and determined that the victim died from multiple gunshot wounds to his left arm and abdomen that resulted in extensive internal damage to the victim's aorta and inferior vena cava. Doctor Deering concluded that the victim ultimately bled to death from his internal injuries. The toxicology screen of the victim also revealed the presence of Valium and cocaine.

State v. Leslie Raydell Jones, No. M2006-01829-CCA-R3-CD, 2007 WL 4224638, at **1-5 (Tenn. Crim. App. Nov. 30, 2007).

The posture of this case is that, upon the first appeal, this court affirmed the defendant's premeditated first degree murder conviction but determined that his conviction for especially aggravated burglary was precluded by statute. See Tenn. Code Ann. § 39-14-404(d). Therefore, this court modified the judgment of conviction for especially aggravated burglary to aggravated burglary and remanded for resentencing on that conviction. The resentencing hearing was conducted on February 21, 2008.

At the hearing, the court appointed the defendant's trial counsel to represent the defendant at resentencing and, if the defendant chose to appeal, on appeal of the resentencing decision. The State asked the court to "incorporate by reference the facts that came out at the trial of this matter." The trial court admitted copies of the original presentence report and original sentencing hearing as exhibits.¹ After arguments by the parties, the court adopted its previous ruling "for purposes of th[e] sentencing hearing as well" and made additional observations with regard to the enhancement factors. The court enhanced the defendant's sentence to six years, the maximum in the range, and ordered that it be served consecutively to his life sentence upon finding the defendant a dangerous offender. See id. § 40-35-115(4).

In a seemingly separate matter, before the resentencing hearing took place, the defendant filed a *pro se* petition for writ of error coram nobis on January 28, 2008. Then, at the end of the resentencing hearing, the trial court noted that the defendant had filed a *pro se* petition for writ of error coram nobis, which the court dismissed because the defendant filed the motion while

¹ Neither exhibit is included in the record on appeal.

represented by counsel. Thereafter, on March 14, 2008, the trial court entered an order stating: “This cause came on to be heard on the 21st day of February, 2008, . . . upon a pro se motion, and from the record as a whole, from all of which the Court finds that said motion be denied as the defendant had counsel of record.” On June 25, 2008, the trial court entered another order stating: “This cause came on to be heard on the 19th day of May, 2008, . . . upon the defendant’s petition for writ of error, which the Court denied for reasons stated on the record.”

A notice of appeal was filed on March 25, 2008, stating that the defendant was appealing from the order “in a re-sentencing hearing entered in this cause on the 21st day of February, 2008.” In addition, the defendant’s appellate brief deals exclusively with the resentencing issue. Thus, the resentencing issue is the only matter before this court.

ANALYSIS

Although at sentencing the trial court found several enhancement factors to be applicable, on appeal the defendant questions application of only one of the factors, that the victim was treated with exceptional cruelty in the commission of the offense. See Tenn. Code Ann. § 40-35-114(5) (2006). He asserts that “exceptional cruelty is defined as disfigurement, maiming or torturing a victim,” and there was no proof of such at the trial or either sentencing hearing. The State argues the defendant has waived this issue for failing to cite authority in support of his claim or provide references to the record. See Tenn. Ct. Crim. App. R. 10(b). Notwithstanding waiver, we discern no error in the sentence imposed.

When an accused challenges the length and manner of service of a sentence, it is the duty of this court to conduct a *de novo* review on the record “with a presumption that the determinations made by the court from which the appeal is taken are correct.” Tenn. Code Ann. § 40-35-401(d) (2006). This presumption is “conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused or to the determinations made by the trial court which are predicated upon uncontroverted facts. State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994); State v. Bonestel, 871 S.W.2d 163, 166 (Tenn. Crim. App. 1993), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9 (Tenn. 2000).

In conducting a *de novo* review of a sentence, this court must consider (a) any evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancement factors, (g) any statements made by the accused in his own behalf, and (h) the accused’s potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103, -210 (2006); State v. Taylor, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). The party challenging the sentence imposed by the trial court has the

burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401 (2006), Sentencing Commission Cmts.; Ashby, 823 S.W.2d at 169.

In imposing a specific sentence within a range, a trial court “shall consider, but is not bound by” certain advisory sentencing guidelines, including that the “minimum sentence within the range of punishment is the sentence that should be imposed” and that “[t]he sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors[.]” Tenn. Code Ann. § 40-35-210(c)(1), (2). The weighing of the various mitigating and enhancement factors is “left to the trial court’s sound discretion.” State v. Carter, 254 S.W.3d 335, 345 (Tenn. 2008).

In enhancing the defendant’s sentence, the court found that the defendant had a prior record of criminal convictions; in particular, one felony and several misdemeanors. See Tenn. Code Ann. § 40-35-114(1).² The court said that the defendant was a leader in the commission of the offense, which it “believe[d] the proof [bore] out.” See id. § 40-35-114(2). The court found that the defendant treated the victim with exceptional cruelty in the commission of the offense, see id. § 40-35-114(5), and the personal injuries inflicted upon the victim were particularly great, see id. § 40-35-114(6). The court noted that factors five and six were not elements of aggravated burglary and were factually sustained by the record. The court found that the defendant had failed to comply with conditions involving release in the community in that “[h]is felony probation had been revoked previously.” See id. § 40-35-114(8). The court observed that the defendant “[c]learly used a firearm in committing [the] aggravated burglary” and that using a firearm was not an element of aggravated burglary. See id. § 40-35-114(9). The court lastly stated that the defendant had no hesitation about committing a crime when the risk to human life was high because “in fact he took a life,” and aggravated burglary does not require any weapon or injury as an element of that offense.” See id. § 40-35-114(10).

With regard to factor five, the trial court stated, “As to your argument that on number 5 that exceptional cruelty requires disfigurement, torture or maiming, well, the victim was killed in the course of the burglary. I submit that that does constitute perhaps not torture but certainly if you kill someone you have disfigured and maimed them[.]” However, the court added that, “[S]hould I be in error in applying number 5, I feel like the other enhancing factors I found are going to be sufficient to support a maximum sentence of six years anyway.”

We note that it is arguable whether the trial court correctly applied the “exceptional cruelty” enhancement factor. Whether the victim was treated with exceptional cruelty is not an element of the offense of aggravated burglary. State v. Alvarado, 961 S.W.2d 136, 151 (Tenn. Crim. App. 1996). However, the “exceptional cruelty” factor is usually found in cases of abuse or torture. See State v. Williams, 920 S.W.2d 247, 259 (Tenn. Crim. App. 1995), and this was apparently a “basic” shooting. On the other hand, this court has defined “exceptional cruelty” as “cruelty above that

² We utilize the numbering of the enhancement factors used by the trial court and the parties at the resentencing hearing.

needed to effectuate the crime.” State v. Lester Bennett, No. 03C01-9403-CR-00104, 1994 WL 683373, at *2 (Tenn. Crim. App. Dec. 8, 1994), and killing the victim was clearly above that needed to effectuate an aggravated burglary. See Tenn. Code Ann. § 39-14-403 (defining aggravated burglary as burglary of a habitation).

In any event, the court found a number of other factors, and this court has held that application of even a single factor may be sufficient to justify an enhanced sentence. See, e.g., State v. Eric D. Charles, No. W2007-00060-CCA-R3-CD, 2008 WL 246023, at *6 (Tenn. Crim. App. Jan. 30, 2008); State v. Shawn McCobb and Marcus Walker, No. W2006-01517-CCA-R3-CD, 2007 WL 2822921, at *4 (Tenn. Crim. App. Sept. 26, 2007). Moreover, the trial court apparently gave little weight to factor five because the court noted that, even if incorrectly applied, the other enhancement factors were sufficient to support the maximum sentence.

CONCLUSION

Based on the aforementioned authorities and reasoning, we affirm the trial court’s sentencing decision.

ALAN E. GLENN, JUDGE